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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

E.I. DUPONT DE NEMOURS AND COMPANY

Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY

Defendant.

Docket No. NOR 42125

**NORFOLK SOUTHERN RAILWAY COMPANY'S REPLY TO SECOND
MOTION TO COMPEL OF E.I. DUPONT DE NEMOURS AND COMPANY**

Defendant Norfolk Southern Railway Company ("NS") hereby responds to Complainant E.I. Du Pont De Nemours and Company's ("DuPont's") Second Motion to Compel, filed July 22, 2011 ("Motion"). DuPont's Motion is premature, as its opening evidence is not due for several months and it has requested a discovery extension until 45 days after the FRA and TSA issue a decision authorizing NS to produce the data at issue. The relief DuPont seeks would distort the SAC analysis and the accuracy of its results, and impose an undue burden on NS that would outweigh any marginal benefit that might result from potentially faster production of incomplete traffic and event data. Accordingly, the Motion should be denied. A far better and more appropriate course of action for all parties concerned would be for the Board -- in consultation with FRA, and TSA -- to issue a decision on the SSI issue that has been pending for several months.

I. RATHER THAN RESORTING TO EXTRAORDINARY AND DISTORTING MEASURES, THE BOARD, FRA, AND TSA SHOULD PROMPTLY ISSUE A DECISION PROVIDING THE CONDITIONS UNDER WHICH NS MAY PRODUCE SSI TO DUPONT IN THIS CASE.

As NS explains in its Reply to SMEPA's pending Motion to Compel Discovery (also filed today), NS agrees that the traffic data sought by Complainants is relevant and important to a SAC case, and NS would have produced the data long ago but for its concerns regarding regulatory limitations on disclosure of SSI, information that is spread throughout that traffic data. *See* NS Reply to SMEPA's First Motion to Compel Discovery (July 29, 2011).¹ Further, NS shares Complainants' frustration at the time it has taken the responsible agencies to decide this issue. However, the appropriate and sound way to address the issue is for the FRA, TSA, and STB to collaborate and promptly issue a decision that establishes the conditions under which NS may produce the data to DuPont's representatives in this rate case. If completed expeditiously, this approach would result in production of full traffic data to DuPont in less time than it would take for NS to complete the arduous process of culling TIH traffic and event information from the hundreds of millions of traffic records it has assembled in response to DuPont's discovery requests. And, it would avoid the potential distortion of the SAC process, analysis, and results inherent in DuPont's proposal.

Moreover, even if DuPont's proposal were reasonable and did not hold the potential for substantial distortion of the SAC analysis and results, it would be premature. DuPont's claim of urgency is significantly overstated. Its SAC evidence is not due until October 31, 2011, more than three months from now. If the Board, in cooperation with FRA, and TSA, issues a decision concerning the production of SSI decision in the near future, DuPont will still have plenty of time to develop its SAC evidence by the deadline. Indeed, it has been barely two weeks since

¹ NS hereby incorporates its Reply to SMEPA's Motion to Compel to this Reply (filed July 29, 2011), as if set forth in full herein.

DuPont filed a newly revised complaint. *See* Second Amended Complaint (July 18, 2011).

DuPont has also requested additional time for follow-up discovery if necessary following the agencies' decision authorizing production of the traffic and event data, and advised the Board that this would also require an extension of the deadlines for filing evidence. *See* DuPont Motion to Modify Procedural Schedule (June 30, 2011). If the Board were to grant DuPont's previously filed deadline-extension motion, its opening evidence likely would not be due until at least December 15, 2011 (45 days after the due date specified by the existing schedule), giving DuPont a minimum of nearly five months from the filing of its present Motion in which to develop its SAC evidence.²

II. DUPONT'S PROPOSAL TO PRECLUDE THE PARTIES FROM USING ACCURATE ROUTING INFORMATION WOULD DISTORT THE SAC PROCESS AND RESULTS.

DuPont's Motion proposes that NS be required to expend substantial effort and resources to conduct a special study to remove from the traffic and event records (including waybill data and event records) prepared for this case all routing data for Toxic By Inhalation ("TIH") traffic, and that the parties then be precluded from using that redacted data to determine the routing of any SARR traffic for which routing data has been redacted.³ DuPont further requests that the Board preclude parties from using this actual routing data even if – as NS anticipates—FRA and TSA authorize its production (with appropriate security protections) in this rate case. *See* Motion at 5. This rule, if accepted, would require the parties to use substantially inferior data and

² Even the December 15 deadline estimate is probably conservative, as it assumes that DuPont would request the same length of extension of the opening evidence due date as it has requested for extension of discovery. DuPont has not indicated how long an extension of the opening evidence date it intends to seek, but it is entirely possible, perhaps even likely, that DuPont will seek more than the 45 additional days it has requested for more discovery.

³ Notwithstanding DuPont's claim to the contrary, this time-and-resource intensive effort to create a new database in a form in which it does not exist, *would* be a "special study," which the Board has consistently held rate case defendants are not required to perform. *See infra* at III.

tools to determine the routing of traffic that DuPont includes in its traffic group, including issue traffic.

Because TIH traffic is subject to special routing requirements and rules (as well as special handling and interchange requirements), routes suggested by off-the-shelf software may not be feasible or permissible. Moreover, DuPont's proposal would allow it to re-route traffic from its actual route of movement—including crossover traffic—while simultaneously precluding NS from challenging those re-routes or showing that they do not satisfy the Board's requirements for permissible re-routes. *See, e.g., Western Fuels Ass'n Inc. v. BNSF Railway*, STB Docket No. 42088 (Feb. 18, 2009); *Duke Energy v. CSXT*, 7 S.T.B. 402, 418 (2004); *Duke Energy v. NS*, 7 S.T.B. 89, 112-113 (2003); *TMPA v. BNSF*, 6 S.T.B. 573, 594-595 (2003). Further, NS would be effectively precluded from showing that routes posited by the Complainant violate TSA, PHMSA, and FRA regulations governing the security and routing of TIH traffic.

Use of impermissible and distorting re-routes, in turn, could substantially distort the SAC analysis and undermine the accuracy and validity of its results. The use of incorrect routings and re-routings of TIH commodities would also have other, indirect distorting effects on components of the SAC analysis including the proper distribution of crossover traffic revenue between the SARR and the residual incumbent (using ATC methodology), and determination of which lines and equipment would require the installation of Positive Train Control systems and the accompanying capital investment. These and other distorting effects of DuPont's proposal to preclude the parties from using accurate routing and event data would significantly undermine the accuracy and validity of the SAC analysis and might well render any resulting maximum reasonable rate determination, rate prescription, or reparations arbitrary and capricious.

III. THE BURDEN OF DUPONT'S PREMATURE PROPOSAL WOULD OUTWEIGH THE VALUE OF THE RESULTING INFORMATION.

Contrary to DuPont's supposition, its proposal that NS redact all SSI from traffic waybill and event records would impose a substantial burden on NS. Because of the unprecedented scope and scale of this case, the traffic and event data that NS has developed, compiled, and integrated for purposes of this case totals approximately 500 million records. *See* Verified Statement of B. Fisher and M. Matelis at 3 (attached hereto). Records from which routing information for TIH traffic could be determined are interspersed throughout these hundreds of millions of records. And, there is no simple or expeditious way to extract routing data for TIH commodities from those hundreds of millions of records. Instead, NS and its consultants would be required to engage in a detailed and complex multi-step process to identify, locate, and remove that SSI. As described in the attached Verified Statement of Fisher and Matelis, the complex process of extracting SSI would take at least six weeks of intensive work to complete.

Because it would take six weeks or more for NS to conduct the special study necessary to produce redacted data, DuPont's proposal could well reduce, rather than increase, the time it has to prepare its opening evidence. Moreover, the agencies' expeditious issuance of a collaborative decision authorizing NS to produce its traffic and event data (under whatever conditions the agencies determine appropriate) would render DuPont's Motion moot, while simultaneously avoiding the complications and distortions of the SAC process that would result from the implementation of DuPont's proposal. Accordingly, NS urges the agencies (STB, FRA, and TSA) to issue an appropriate decision(s) resolving the SSI questions and concerns, as soon as possible. *See* NS Reply to SMEPA First Motion to Compel Discovery at 2-3, 8.

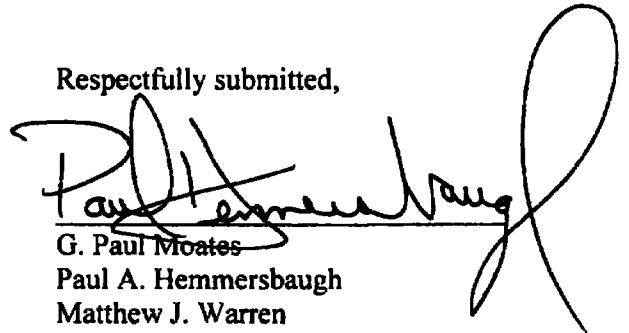
Regardless, the substantial burden of conducting a special study to remove of TIH routing data substantially outweighs the value of the resulting data. As discussed above, the absence of

event data would render all TIH movement data substantially incomplete and use of such elliptical data in a SAC case would add complexity to the SAC analysis and great potential for distortion of that analysis and results. Thus, the usefulness and “value” of the redacted traffic data in a SAC case would be lower than that of the full data and therefore cannot justify imposing on NS the burden of creating such flawed data. As DuPont acknowledges, it is well-established that “discovery may [] be denied if it would be unduly burdensome in relation to the likely value of the information sought.” Motion at 7 (quoting *Waterloo Railway*, STB Dkt. N. AB-124 (Sub-No. 2) (May 6, 2003)). As NS has demonstrated, the burden of extracting routing data – in terms of time and resources – would be substantial and unnecessary. Because DuPont’s Motion seeks to compel NS to conduct a special study whose burden outweighs the relative value of the resulting information, its Motion should be denied.

CONCLUSION

DuPont's proposal is premature, ill-advised, and would undermine the rigor and validity of a SAC analysis. Moreover, the relief sought by the Motion would impose an undue burden on NS that outweighs the value of the materially incomplete information it seeks. The Motion should be denied, and the Board should continue to work with FRA and TSA to issue a decision (as promptly as possible) allowing the production of the full traffic data while adequately protecting SSI.

Respectfully submitted,



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Dated: August 1, 2011

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

E.I. DUPONT DE NEMOURS AND COMPANY

Complainant,

v.

Docket No. NOR 42125

NORFOLK SOUTHERN RAILWAY COMPANY

Defendant.

**JOINT VERIFIED STATEMENT OF BENTON V. FISHER AND MICHAEL
MATELIS IN SUPPORT OF NORFOLK SOUTHERN RAILWAY'S REPLY TO
SECOND MOTION TO COMPEL OF E.I. DUPONT DE NEMOURS AND COMPANY**

I. INTRODUCTION

We are Benton V. Fisher and Michael Matelis. We are Senior Managing Director and Director, respectively, in FTI Consulting's Network Industries Strategies practice with offices at 1101 K Street, NW, Washington, DC 20005. Benton Fisher has been involved in coordinating the collection and production of Norfolk Southern (NS) materials responsive to DuPont's discovery requests in this proceeding. Michael Matelis has primary responsibility for review and verification of large datasets responsive to DuPont's requests. Statements of our qualifications are set forth in Exhibits 1 and 2, respectively.

In its Second Motion to Compel of E.I. DuPont de Nemours & Company, DuPont asks the Board to compel NS to produce materials responsive to DuPont RFPs 20 through 22 that "do

not implicate SSI". Specifically DuPont asks the Board to order NS to only produce non-SSI data by redacting the routing information for shipments of TIH commodities from the traffic data files (Motion at 5.) DuPont asserts that the burden to NS of redacting SSI data from the traffic files is negligible, suggesting that it is a straightforward exercise to identify all of the SSI data and simply redact it electronically. We have been asked by Counsel for NS to articulate for the Board the burden to NS of identifying and redacting SSI related data from the traffic data.

II. BACKGROUND

Before getting to the process details, it is important to put DuPont's traffic data discovery requests into perspective. First DuPont's requests are unprecedented in scope. In typical stand-alone cost proceedings before the Board, the scope of complainant's traffic data requests are geographically limited to the states traversed by the route of the issue traffic. Here, because of the number of lanes involved in DuPont's complaint, the state limitation is virtually meaningless. DuPont seeks information for all but two of the 22 states served by NS. In addition to geographic scope, the amount of detailed information sought exceeds that for any prior stand-alone case. Request 20, which seeks information largely associated with NS waybill and revenue accounting data includes 46 subparts. Request 21 seeks for each and every car, container, locomotive and train moving over the vast majority of the NS network detailed event and tracking information from January 1, 2008 to the present. In 2010 alone NS moved 3.8 million carloads and 2.9 million intermodal containers. It also accrued 72.6 million train miles, 179.4 million locomotive unit miles and 1.3 billion freight car miles. For the years 2009 and 2010, the detailed information sought by DuPont comprises approximately one-half billion (500 million) individual records.

Further, because the NS revenue accounting and train, locomotive and car event tracking systems are designed to optimize NS's management of its railroad and to function efficiently within the NS mainframe computer network, the traffic data are not maintained in the format requested by DuPont. NS has already committed significant resources to extract from its systems the requested information which presently comprises over 250 individual files and over 19 gigabytes of compressed data under five major categories – event, handling, haulage, switching and waybill – with many of the records, particularly related to waybill data, variable length.

III. EFFORTS REQUIRED TO REDACT SSI DATA

Redacting the SSI data from the traffic data will be an onerous task and, because of the data overlaps across different files, will require substantial follow-up verification to ensure that all references are removed. At a very high level, the process would be as follows:

1. Develop a list of all commodities subject to SSI rules and regulations.
2. Waybill data are available quarterly, so it is necessary to unzip and upload each quarter's information. Next, using the SSI commodity list developed in Step 1, identify all SSI shipments from the 2009 and 2010 waybill data.
3. Remove SSI shipments from waybill data and create a separate file of all SSI movements.
4. Event data are available quarterly, so it is necessary to unzip and upload each quarter's event information. Next, using the database created in Step 3 of all SSI shipments, identify within the shipment event data all events associated with each SSI movement and redact from event data.
5. Create a new separate database of the SSI events removed from the event files.
6. The next, and likely most complex, step is to develop logic to identify empty movement legs associated with each SSI shipment and redact those movements from event data.
7. Locomotive event data are available quarterly, so it is necessary to unzip and upload each quarter's locomotive event data. Next, using the database created in Step 5, identify

within the locomotive event data all trains carrying SSI shipments and redact from event data.

8. Handling event data are available annually, so each year's data needs to be unzipped and uploaded. Next, using the database created in Step 3, identify within the handling event data all events associated with SSI movement and redact from handling event data.
9. Haulage data are available by haulage agreement. There are over 100 haulage related traffic files, each of which needs to be scoured to identify and remove all data associated with SSI movements.
10. Switching data are available by switch carrier in half-year increments. There are over 120 individual switching files, each of which needs to be reviewed to identify and remove all data associated with SSI movements.

In addition to the traffic and revenue files, DuPont RFP 22 seeks all NS dispatch information. Dispatch data are available quarterly and contain much of the same information as the event and locomotive files. As such, once all of the relevant SSI records have been identified and removed from the traffic data, a comparable effort to identify and remove the same information from the dispatch data is required.

The total time required to perform these exercises is estimated at a minimum of five weeks, plus an additional week to verify that all SSI related materials have been successfully removed. At the very least, then, we estimate it would take six weeks to complete the removal of the SSI information from the NS traffic and event records. Of course, if the Board, FRA and TSA determine that NS production of the full traffic data may be performed consistent with SSI protocols, the effort described above would be wasted.

EXHIBIT 1

STATEMENT OF QUALIFICATIONS

My name is Benton V. Fisher. I am a Senior Managing Director in the Network Industries Strategies ("NIS") group of the economic division of FTI Consulting, Inc. My office is located at 1101 K Street, N.W., Suite B100, Washington, DC 20005.

I am a graduate of Princeton University from which I obtained a Bachelor's of Science degree in Engineering, from the Civil Engineering and Operations Research department. I graduated with a concentration in Information and Decision Sciences, and also received a certificate for completing the requirements for the Engineering and Management Systems program. After graduating, I served as the Deputy Controller for the U.S. Senate re-election campaign for Bill Bradley, and since April 1991 have been employed by FTI Consulting and Klick, Kent & Allen, an economic consulting firm that FTI Consulting acquired in 1998.

Much of the NIS group's work focuses on the economic and financial analysis of network industries, in particular different aspects of transportation. I have spent more than 19 years involved in the analysis of rates, costs, and service, and the factors that affect them. In the rail industry, I have worked extensively to develop expert testimony before the Surface Transportation Board ("STB") examining the reasonableness of railroad rates, railroads' applications for mergers and acquisitions, and rulemakings regarding the establishment, evaluation, revision, and implementation of rules and regulations. I have managed the development of expert testimony covering a variety of topics in numerous contract disputes in Federal court or Arbitration, requiring the analysis of economic and operating issues and response to service performance or

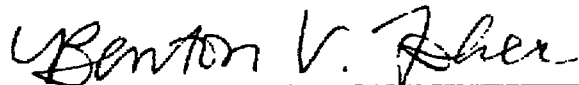
other claims. In addition to analyzing extensive financial and operational data, I have worked closely with many departments at the railroads as well as outside counsel. Additionally, I have reviewed the expert testimony of other parties in these proceedings, and developed and implemented the course of action to respond.

Much of my work for the railroad industry has required a detailed understanding of the regulations under which railroads operate, the rules by which rates are evaluated, and the costing approaches and models that are used. I have testified numerous times regarding stand-alone costs and URCS costs (Uniform Railroad Costing System, the STB's general purpose costing system) for individual movements, traffic groups, and entire networks. I have extensive experience with these costing approaches, including the detailed inputs and their sources, and the costing methodologies and formulae.

In addition to the rail industry, I have been engaged with similar issues and disputes regarding the economic and financial analysis of telecommunications, postal, and energy matters. In those matters, as with rail, I have worked closely with detailed price, cost, and operational data and reviewed cost models and analyzed the sensitivity of multiple economic components, in evaluating rates, costs, and service in a variety of different contexts.

I declare under penalties of perjury that the foregoing is true and correct. I further certify that I am qualified and authorized to sponsor and file this testimony.

Executed this 1st day of August, 2011.



Benton V. Fisher

EXHIBIT 2

STATEMENT OF QUALIFICATIONS

My name is Michael Matelis. I am a Director in the Network Industries Strategies ("NIS") group of the economic division of FTI Consulting, Inc. My office is located at 1101 K Street, N.W., Suite B100, Washington, DC 20005.

I am a graduate of the University of North Carolina at Chapel Hill from which I obtained a Bachelor's of Arts degree in Economics with a minor in Information Systems. After graduating, I worked for BearingPoint Inc. in which I consulted clients on business analysis and operations, data management, and the development of information systems. Since January 2009 I have been employed by FTI Consulting as part of the NIS group.

My work with the NIS focuses on managing and analyzing railroad accounting and operating data, including revenue waybill and shipment event data. I have constructed and managed databases covering many different types of railroad information; developed and critiqued models used to evaluate operations, costs, and rates; and performed detailed analyses of traffic volumes and rates in support of evidence filed in STB, Court, and arbitration disputes.

I declare under penalties of perjury that the foregoing is true and correct. I further certify that I am qualified and authorized to sponsor and file this testimony.

Executed this 1st day of August, 2011.

Michael Matelis

Michael Matelis

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of August 2011, I caused a copy of the foregoing **Norfolk Southern Railway Company's Reply To Second Motion To Compel Of E.I. DuPont De Nemours And Company** to be served on the following parties by first class mail, postage prepaid or more expeditious method of delivery:

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